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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753.

ALEXANDER BIRNS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

SUPPLEMENTARY BRIEF TO PETITION FOR CERTIORARI PURSUANT TO RULE 24(5).

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PRELIMINARY STATEMENT.

Since filing the petition for certiorari in the present case, *Katz v. United States,* ___ U.S. ___, L.ed. (1967) 36 LW 4080 (12/18/67) has come down. This supplement to the petition for certiorari is filed pursuant to Rule 24(5) on the assumption that the *Katz* decision raises an issue of substance not available to the petitioner at the time of the original filing and provides an additional reason for grant of certiorari.

STATEMENT OF THE CASE.

The original statement of the case described the testimony of State's Witness Eschweiler who testified to what he heard on a radio receiver in his car outside a restaurant while petitioner was talking to another officer, Detective Bennett, equipped with a transmitter. The State claimed this talk incriminated the petitioner. Petitioner demanded the tape as soon as its existence became known to him (R. 127-128, 711) and demanded that it be produced at the

trial. This on the ground that a clear and honest tape would exculpate him. It was played and was so noisy and garbled as to be all but totally unintelligible.[1]

REASONS FOR GRANTING THE WRIT.

Whether the use of evidence surreptitiously acquired by electronic means violates Fourth and Fourteenth Amendments in the absence of a search warrant.

Conceivably it may be argued that petitioner opened the door to the corroborating testimony of Witness Eschweiler by demanding the tape and getting it. The rebuttal to this proposition lies in the fact that the petitioner could not know in advance that Witness Eschweiler would say and therefore was unaware until Eschweiler testified that what he had to say would require rebuttal. By the time it became known that rebuttal was required, the knowledge that the only rebutting agent, the tape, was garbled was also in hand.[2] But in the absence of the *Katz* decision, the petitioner did not know[3] the availability of

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[1] A possible exception to this judgment on the tape lies with one passage where the following colloquy is clear:

Bennett: "* * * What I want to know is one thing what do I have to do for this" * * *?

Petitioner Birns: "Nothing I said." (R. 476, cf. R. 407. The indication of parties to the colloquy has been added. The voices and sequence on the tape fully support the attributions here. See St. Ex. 2.)

[2] Actually, a motion to suppress the tape and police testimony was made upon a specific reservation of right to make it. (R. 7, 441-444.) The ground was the false representation to the Trial Court that a copy of the tape was the original in the presence of a policeman witness with knowledge of the truth (R. 203, 312-313, 611, 613, 619-620).

[3] Whatever the reach of *Osborn v. United States*, 385 U. S. 323 (1966) it was by no means clear that it established the "requirement" of a "neutral pre-determination of the scope of a search," *Katz v. United States, supra*, p. 4083, in an electronic search of the kind involved here.

a basis of attack upon the product of the warrantless electronic search. product for lack of "antecedent justification":

> "* * * Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification * * * that is central to the Fourth Amendment," a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed. *Katz v. United States*, p. 4083.

The failure to assert a constitutional proposition unripened at the time of first notice of the facts which make it available does not foreclose assertion when, at last, the principle is announced. See *Curtis Publishing Co. Butts*, 35 L.W. 4636, 4639 (U.S. S.Ct. 6/12/67).

CONCLUSION.

The electronic product (i.e. the testimony of Witness Eschweiler) was acquired in violation of the Fourth Amendment to the Constitution of the United States, obviously led to petitioner's conviction, and therefore should be reversed.

The same conclusion is warranted with respect to the testimony of the Witness Detective Bennett who carried on the face to face conversation with the petitioner while wired and geared for broadcasting—again without antecedent justification by a neutral magistrate.

To do otherwise than suppress this testimony allows the police the best of two possible worlds. If the tape supports them, the victim is scientifically shut out of a rebuttal. Should the tape not verify the police or be garbled, as

here, then the eavesdropper's "remembered" product of the illegal acquisition is used to convict. An electronic search can become a monstrous weapon if the yield is not accurately and clearly preserved and made available to both sides without an alternative product (i.e. oral testimony) available to the State should the recording be faulty. Whether the fault is deliberate or not is immaterial.

Respectfully submitted,

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